

**DECISION**



*Security*  
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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE: B-204055**

**DATE: May 17, 1982**

**MATTER OF: Roy M. Mayberry, Jr.**

**DIGEST:**

1. A Regular Army enlisted member serving in grade E-5 was retired in 1971 due to physical disability. While on the retired list he acquired civilian training as an anesthetist. In 1977 he was commissioned an officer in the Army Reserve and returned to active duty in the Medical Corps. He then became entitled to active duty pay of the officer grade he served in, and his entitlement to E-5 disability retired pay automatically terminated. He did not remain on active duty long enough to become eligible for retirement based on longevity of service, nor did he incur additional disabilities to establish a "new" disability retirement. His original retirement orders were still in effect, and he simply reverted to his original disability retirement status under those orders when released from active duty.
2. A retired Army enlisted member who served a year on active duty as a Reserve captain and reverted to his status as a permanently disabled retired enlisted member (E-5) when released from active duty, then again became entitled to his E-5 disability retired pay as originally computed with appropriate cost-of-living adjustments. Alternatively, if it were to his advantage, he was entitled to disability retired pay recomputed under the appropriate statutory formula contained in 10 U.S.C. 1402, which provides certain prescribed methods for the recomputation of retired pay to reflect active duty performed subsequent to retirement.

3. An Army enlisted member who was retired for permanent physical disability after being rated as 30 percent disabled, was later recalled to active duty and served for a year as a Reserve captain without incurring any additional physical disabilities or an aggravation of his existing disability. In those circumstances, he was eligible to have his disability retired pay recomputed under the statutory formula more favorable to him prescribed by subsection (a) or (e) of 10 U.S.C. 1402. Under those formulas his retired pay would be limited to the applicable basic pay rate multiplied by 2-1/2 percent of his years of creditable service, and he may not use his 30 percent disability rating as the percentage multiplier.

This action is in response to a request from the Chief of the Retirement Branch, United States Army Military Personnel Center, for a decision concerning the method to be used in computing the disability retired pay of Roy M. Mayberry, Jr., for periods following his separation from active military service in July 1978. Mr. Mayberry was retired from the Regular Army on September 1, 1971, on grounds of permanent physical disability in the enlisted grade of specialist five (E-5), but he was subsequently appointed an officer in the Army Reserve and served on active duty in the commissioned grade of captain (O-3) between July 1977 and July 1978.

We have concluded, in light of the particular facts presented, that in July 1978 Mr. Mayberry became entitled to disability retired pay calculated under the more favorable of the following two methods:

1. disability retired pay in the amount he was receiving in September 1971 computed under formula number 1 of 10 U.S.C. 1401, as increased by subsequent cost-of-living adjustments, or

2. disability retired pay recomputed under the formula prescribed by 10 U.S.C. 1402(a), using the basic pay rate of captain (O-3) in that formula or as prescribed by 10 U.S.C. 1402(e).

Mr. Mayberry enlisted in the Regular Army in March 1967. In August 1970 he was placed on the Army's temporary disability retired list because of wounds he sustained in combat. After further medical evaluation he was retired under 10 U.S.C. 1201 on September 1, 1971, in the enlisted grade of specialist five on grounds of permanent physical disability. He was given a disability rating of 30 percent when so retired.

At the time he was permanently retired he became entitled to disability retired pay computed under formula number 1 of 10 U.S.C. 1401. That formula provides for retired pay computed as an amount equal to a service member's monthly basic pay multiplied by either 2-1/2 percent of his years of creditable service, or his percentage of disability, as he may elect. Apparently, Mr. Mayberry then began receiving monthly retired pay in an amount equal to 30 percent of his monthly E-5 basic pay, since it would have been advantageous for him to elect payments based on the percentage of his disability rather than on 2-1/2 percent of his years of creditable military service.

Following his 1971 retirement from the Army, Mr. Mayberry became professionally qualified as an anesthetist. In 1977 he applied for an Army Reserve commission with a view towards serving as an anesthetist with the Army's Medical Corps. He was found physically fit to serve on active duty in that capacity, notwithstanding his permanent injuries for which he had been retired, and was commissioned as an officer of the Army Reserve on July 2, 1977. He was called to extended active duty in the grade of captain in July 1977. He served as a commissioned officer until released from active service upon his application on July 16, 1978, at which time he was still serving in the grade of captain. During that period of active duty he incurred no additional physical disabilities, nor were his existing injuries aggravated.

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Mr. Mayberry's release from active duty in July 1978 was accompanied by orders indicating that he was being retired on grounds of permanent physical disability in the grade of captain.

Since that time, officials of the Army Finance and Accounting Center and Judge Advocate General's Corps have raised questions concerning the propriety of Mr. Mayberry's recall to active Army service in 1977 and his "re-retirement" in 1978. First, those officials have expressed doubts concerning the validity of Mr. Mayberry's appointment as a commissioned officer in 1977. They question whether that appointment was compatible with his status as an enlisted member permanently retired for reasons of physical disability, particularly since there is no indication that he affirmatively waived receipt of retired pay as an enlisted member when he accepted his officer's appointment. Second, even if Mr. Mayberry's appointment as a Reserve officer in 1977 was valid, the officials express further doubts concerning the orders issued in 1978 by the Army Military Personnel Center retiring him as a captain on grounds of physical disability. They suggest that he should instead have reverted to his original disability retired status, particularly since he did not incur any additional physical disabilities while serving on active duty as a captain. Finally, they are uncertain as to the proper basis for computation of his retired pay upon his release from active duty in July 1978.

The retirement of an active duty service member who has completed less than 20 years of creditable service is authorized if he incurs a permanent disability in the performance of duty that is rated at least 30 percent. 10 U.S.C. 1201. A service member retired for disability generally retires in the grade in which he is serving on the date of retirement. See 10 U.S.C. 1372. His disability retired pay is then computed under the statutory method prescribed by formula number 1 of 10 U.S.C. 1401, described above.

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Provisions of law governing the recomputation of retired pay to reflect active duty performed after retirement are contained in 10 U.S.C. 1402. Subsection 1402(a) prescribes a recomputation formula for a service member who retires and who thereafter serves on active duty without incurring any additional physical disability during the period of later active duty. Insofar as is here pertinent, that formula provides for the recomputation of his retired pay based on the "Monthly basic pay of the grade in which he would be eligible to retire if he were retiring" upon his release from the later period of active duty. In the recomputation of his retired pay, that amount must then be multiplied by 2-1/2 percent of his years of creditable service performed prior to retirement plus his years of active service after retirement. Alternatively, under 10 U.S.C. 1402(e), if it is to the member's advantage, the formula provided in subsection (a) may be used but using the pay rate under which his retired pay was based at the time he reentered active duty with appropriate cost-of-living increases. The service member may not instead elect to have either of those basic pay rates multiplied by the percentage of any disability rating assigned to him during the course of his military service.

Another formula is prescribed in subsections 1402(b) through (d) for a retired service member who returns to active duty and who then incurs a physical disability or additional disability during that later period of active duty. However, these provisions are not applicable in Mr. Mayberry's case.

We have long held that a fully executed retirement order, if regular and valid, is final and can be reopened only upon a showing of fraud, mistake of law, mathematical miscalculation, or substantial new evidence of error. See 44 Comp. Gen. 258, 260 (1964), 31 *id.* 296 (1952). Hence, we have held that enlisted service members who have been properly retired may not be "re-enlisted" for purposes of having their original retirement orders superseded by new "re-retirement" orders. Rather, if they are recalled to active duty after retirement they

Simply become eligible to elect recomputation of their retired pay under the appropriate formula prescribed by 10 U.S.C. 1402. See Matter of Murphy and Ross, B-185138, December 6, 1976; and B-168307, January 5, 1970. Members who serve on active duty after retirement in grades higher than their retired grades, and who become eligible for a recomputation of their retired pay under the formula prescribed by 10 U.S.C. 1402(a), may qualify to have their retired pay recomputed using the basic pay rates of the higher grades, but the recomputation does not operate to alter or supersede their original retirement orders. See 48 Comp. Gen. 398 (1968), 47 id. 289 (1967), 43 id. 442 (1963), and B-168304, January 5, 1970.

As to Mr. Mayberry's appointment as a Reserve officer, we note that a person otherwise qualified who has a "physical defect" that the Secretary of the Army determines will not interfere with the duties to which the person may be assigned, may be appointed as an Army Reserve member. 10 U.S.C. 591(d). On the basis of the information presented to us in this case, we see no reason to question Mr. Mayberry's appointment and service in the Army Reserve. Compare 38 Comp. Gen. 485 (1959). While on active duty, he was entitled to the active duty pay and allowances of the officer grade in which he was serving. 37 U.S.C. 204 and 903. However, during such time he was not, of course, also entitled to receive retired pay. Compare Crist v. United States, 124 Ct. Cl. 825 (1952).

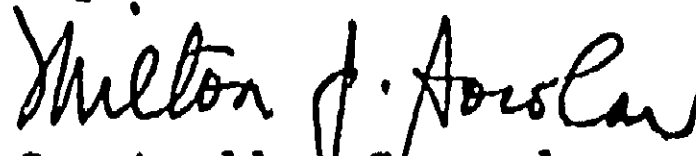
Since in 1978 when Mr. Mayberry was released from active duty he had incurred no new or additional disability during that active duty period, he was ineligible to establish a "new" disability retirement in a higher grade. His original 1971 retirement orders were still in effect and, since he had not served on active duty long enough to establish eligibility for retirement based on longevity of service, he simply reverted to his original disability retirement status under his original retirement orders when he was released from active duty in 1978. He then became eligible only to have his retired pay recomputed under the applicable formula prescribed by 10 U.S.C. 1402.

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Accordingly, the amount of the disability retired pay to which Mr. Mayberry became entitled in July 1978 must be limited to either his original E-5 disability retired pay computed under formula number 1 of 10 U.S.C. 1401 with appropriate cost-of-living adjustments, or to disability retired pay recomputed under the applicable formula prescribed by 10 U.S.C. 1402, whichever computation proves more favorable. See 48 Comp. Gen. 99 (1968).

Concerning the recomputation of Mr. Mayberry's retired pay under 10 U.S.C. 1402, it appears that he did not incur any additional physical disabilities or an aggravation of his existing disability while serving on active duty in 1977 and 1978. Therefore, the recomputation formula applicable to him would be the formula provided under either subsection 1402(a) or (e), whichever is more favorable to him. That is, under section 1402(a) recomputation would be based upon the monthly basic pay of the grade in which he would have been eligible to retire if he could have been retired for reasons of permanent physical disability in July 1978. Since he was then serving in the grade of captain, under the provisions of 10 U.S.C. 1372 he would have been retired in that grade if he had been eligible for original retirement under 10 U.S.C. 1201 on grounds of disability at that time, so that the monthly basic pay of a captain may be used in the recomputation formula. However, since subsection 1402(a) does not authorize use of a disability rating as the percentage multiplier, but limits the multiplier to 2-1/2 percent of the number of years of creditable service performed prior to retirement and years of active service after retirement, the years of service multiplier must be used in his case. Under subsection 1402(e) the computation would be based on the formula described above but using the E-5 pay grade.

The questions presented are answered accordingly. The personnel records forwarded with the request for a decision are being returned to the Military Personnel Center.

*for*   
Comptroller General  
of the United States